CONSTITUTIONALITY OF TEACHERS' PENSIONS LEGISLATION.

II. The Validity of the Proposed Michigan Law, Continued.

We considered the constitutionality of Sections I, and II, of the proposed act in the former paper.[a] Further provisions were as follows:

"Section III. *State Teachers' Retirement Fund Board.* The State Teachers' Retirement Fund Board shall consist of five members to be appointed by the Governor, as hereinafter provided. One of such members shall be, at the time of his appointment, a superintendent of schools; one shall be, at the time of his appointment, a high school teacher; one shall be, at the time of his appointment, a teacher engaged in teaching in a primary school, and one shall be, at the time of his appointment, a county school commissioner. At least one of such members shall be a woman teacher in the public schools. Such appointments shall be made within ten days after this act takes effect. The members of such board first appointed shall hold office for terms of one, two, three, four and five years from August 1, 1915, to be designated by the Governor when he appoints such members. Their successors shall be appointed for terms of five years. A vacancy occurring in the office of any member shall be filled, for the unexpired term, by action of the Governor."

"Section IV. *Officers of Board: Salaries and Expenses: Meetings.* There shall be a president, a vice-president and a secretary of said board, to be elected by a majority vote of the members of the board. The president and the vice-president shall be elected for terms of one year. The term of office of the secretary shall be fixed by the board, but not to exceed three years. The secretary shall not be a member of the board. His salary or compensation shall be prescribed by the board, not exceeding two thousand dollars a year. The members of the board shall serve without compensation, but they shall be entitled to their expenses actually incurred in attending the meetings of the board and in performing services as members thereof.

The Board shall meet annually at Lansing, on the first Friday in October, and shall have such other meetings as the board shall deem necessary.

If a member of the board be absent from two consecutive stated meetings without a reasonable excuse for such absence, accepted by the board, his office shall be declared vacant by the board, and such vacancy shall be filled as hereinbefore provided."

"Section V. *State Treasurer Ex-Officio Treasurer of Fund: Investments* The State Treasurer shall be ex-officio treasurer of the retirement fund and shall be the custodian thereof. The moneys belonging thereto shall be deposited by him in banks or trust companies and the law relating to the deposit of State funds in such banks and trust companies shall apply to the deposit of moneys belonging to the said retirement fund. The State Teachers' Retirement Fund Board shall determine from time to time as to what portion of the permanent retirement fund shall be invested. Such fund shall only be invested in those securities in which the trustees of a savings bank may invest the moneys deposited therein."

"Section VI. *Powers of Board.* The State Teachers' Retirement Fund Board, subject to the provisions of this act and of any other statute, shall have power:

1. To appoint and employ such officers and employees as may be necessary to carry into effect the provisions of this act, and fix their compensation and prescribe their duties.

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[a] See Mich. L. Rev., Vol. XII, p. 27, Nov. 1913.

2. To conduct investigations into matters relating to the operation of this act, and subpœna witnesses and compel their attendance to testify before it in respect to such matters, and any member of the board may administer oaths or affirmations to such witnesses.

3. To require boards of education, trustees and other school authorities and all officers having duties to perform in respect to contributions by teachers to the retirement fund, to report to the board from time to time, as to such matters pertaining to the payment of such contributions, as it shall deem advisable, and may prescribe the form of such reports.

4. To draw its warrants upon the State Treasurer for the payment of annuities to teachers who have been retired as provided in this act and for the purchase of such securities as the board shall have decided to purchase as provided in this act. No payment shall be made from the teachers' retirement fund except by warrant signed by the president of the board, drawn after resolution duly adopted at a meeting of the board by a majority of its members, which adoption shall be attested by the secretary of the board."

"Section VII. *Rules of Board.* The State Teachers' Retirement Fund Board shall make rules not inconsistent with the provisions of this act, which, when approved by the Superintendent of Public Instruction, shall have the force and effect of law. Such rules shall:

1. Provide for the conduct and regulation of the meetings of the board and the transaction of business thereof.

2. Prescribe the manner of payment of contributions by teachers to the retirement fund, and the payment of annuities therefrom.

3. Establish a system of accounts showing the condition of said fund, the receipts and expenditures.

4. Prescribe the method of making payments from said fund to annuitants.

5. Prescribe the forms of warrants, vouchers, receipts, reports and accounts to be used by annuitants and officers having duties to perform in respect to said fund.

6. Regulate the duties of boards of education, trustees, and other officers, imposed upon them by this act, in respect to the other contributions by teachers to the retirement fund, and the deduction of such contributions from teachers' salaries."

The foregoing provisions create an administrative body, and not a court contrary to the constitutional division into legislative, executive, and judicial functions. This body is similar to the railroad commissions,[96] tax commissions, and boards for administering workmen's compensation acts.[97]

Such administrative body is not "an association, or corporation, public or private," and consequently there is no gift or loan of credit to such, nor is there any *corporation* created contrary to the constitutional provisions that corporations shall not be created by special act, but only by general laws.[98] This constitutional provision applies

[96] Mich. Cent. R. Co. v. Mich. R. Comm. (1910), 160 Mich. 355; Oregon R. R. & Nav. Co. v. Campbell (1909), 173 Fed. 954; Minneapolis etc. R. Co. v. R. R. Comm. (1908), 136 Wis. 146, 17 L. R. A. (N. S.) 821, 116 N. W. 905; State v. Superior Court (Wash. 1912), 120 Pac. 861; Board of Trustees v. McCrory (1909), 132 Ky. 89, 116 S. W. 326, 21 L. R. A. (N. S.) 583.

[97] Borgnis v. Falk Co. (1911), 147 Wis. 327; Cunningham v. N. W. Imp. Co. (Mont. 1911), 119 Pac. 554.

[98] Art. XII, § 1.

only to private, and not to public, corporations. So too, "if this be a corporation at all, it is of a political character, constituting an arm of the public service to carry into effect public duties and powers."[99] And besides the law is a general one extending throughout the state dealing with the whole educational system of the state. We have also seen that the state can if that will be the better way to do, administer such a fund through the instrumentality of a private corporation in many of the states.[100]

"Section VIII. *Contributions by Teachers.*

1. All teachers, except those who are entitled to and take exemption under sub-section 3 of this section, shall contribute to the retirement fund according to the following provisions:

a. A teacher who shall have taught ten years or less shall contribute one-half per centum of his annual contractual salary, but not more than five dollars during any year.

b. A teacher who shall have taught more than ten years but not more than twenty years, shall contribute one per centum of his annual contractual salary, but not more than ten dollars during any year.

c. A teacher who shall have taught more than twenty years shall contribute one and one-half per centum of his annual contractual salary, but not more than fifteen dollars during any year.

2. In becoming a teacher in said public schools after the date of this act he or she shall be conclusively deemed to undertake and agree to pay such assessments, and to have such assessments deducted from his or her salary as herein provided.

3. Any person employed as teacher in said public schools, when this act takes effect, may have one year from the date of this act to elect to come within the provisions of this act, by notifying in writing the retirement fund board.

4. At the time of giving said notice to the retirement fund board, as herein provided, such teacher shall notify the local school board or any other managing body in writing of his or her election to come within the provisions of this act; and shall authorize said school board, as a part of said notice, to deduct from each payment of salary due him or her a sum equal to said per centum of such payment as provided in sub-section 1 of this section."

The validity of these provisions concerning contributions by teachers from their salaries depends upon the nature of such contributions. They have been the subject of considerable discussion. Several different views have been taken, some of which are: (a) They are *public funds retained* by the public authorities; (b) they are a part reserved under the contract between the teacher and the school authorities; (c) they are taxes imposed on teachers; (d) they are a taking of the teacher's property without due process of law.

(a) The nature of such contributions has been most fully worked

[99] Allen v. Board of New Jersey (N. J. 1911), 79 Atl. 101.

[100] Trustees v. Roome (1883), 93 N. Y. 313; Firemen's Benev. Ass'n v. Lounsbury (1859), 21 Ill. 511; Commn. v. Walton (1897), 182 Pa. St. 373.

out in the decisions relating to police pensions. One of the early cases is *Pennie* v. *Reis*.[101] The facts were:

On April 1, 1878, a California law provided that the compensation of policemen in the City of San Francisco should not exceed $102 per month, subject to the condition that the treasurer of the city should "retain from the pay of each police officer the sum of two dollars per month to be paid into the fund to be known as the 'police life and health insurance fund,'—from which there should be paid, upon the death of any policeman, $1,000 to his legal representatives. In 1889 the legislature repealed this act and enacted a similar one for the whole state, providing a fund from various taxes, license fees, penalties, etc., and contributions "retained from the pay" of policemen as before, and directing the transfer of the fund accumulated under the former act to the fund created by the act of 1889. This act provided for paying pensions to retiring and disabled policemen, and to their widows and orphans. The plaintiff was administrator of the estate of a policeman who had served in the police force from 1869, until his death in 1889, 9 days after the act of 1889 went into effect. Plaintiff claimed $1,000 due the estate under act of 1878,—on the ground the deceased had a vested property right in that amount at the time of his death, and of which the act of 1889, if enforced, would deprive him without due process of law, and further that the fund in the treasurer's hands (about $40,000, accumulated under the law of 1878) was not public money, but *private* money accumulated from the contributions of members of the police force, and was, like money due on a life insurance policy, property of the deceased's estate. The Supreme Court of the United States by FIELD, J., says:

> "The Court, looking to the statute sees that in point of fact, no money was contributed by the police officer out of his salary, but that the money which went into that fund under the Act of April 1, 1878, was money from the State retained in its possession for the creation of this very fund, the balance —one hundred dollars—being the only compensation paid to the police officer. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property. The Statute in legal effect, says that the police officer shall receive as compensation, each month, not exceeding $100, and that in addition thereto the State will

[101] Pennie v. Reis (1889), 80 Cal. 266, 132 U. S. 46.

create a fund by appropriating two dollars each month for that purpose, from which, upon his death a certain sum shall go to his legal representatives.

"Being raised that way it was entirely at the disposal of the government. . . . The direction of the State that the fund should be one for the benefit of the police officer or his representatives, under certain conditions was subject to change or revocation at any time at the will of the legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money was or part of it was to be paid, there was no vested right in the officer to such payment.

"If the two dollars per month retained out of the alleged compensation of the police officer had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express any opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed could be transferred to other parties and applied to different purposes by the legislature."

This view has been affirmed in many cases. In *Matter of Friel*,[102] the statute provided that not less than "one per cent of monthly pay, salary or compensation of each member" of the police force "shall be deducted monthly by the comptroller." The court says: "The relator had no vested right in an act of the Legislature; the State, in the exercise of its sovereign authority, might have repealed absolutely the statute of 1888 under which he claims, and it might have abolished the office of policeman in the City of Brooklyn, or it might

[102] Matter of Friel (1905), 101 App. D. 155 Affd., 181 N. Y. 558; Matter of Mahon v. Board of Ed. (1902), 171 N. Y. 265, 89 Am. St. R. 810. See also, Head v. Jacobs, 150 Ky. 290, 150 S. W. 349; Gregory v. Kans. City, 244 Mo. 523, 149 S. W. 466; Folk v. Same, 244 Mo. 553, 149 S. W. 473; State v. Rhame, 92 S. C. 455, 75 S. E. 881.

have destroyed absolutely the municipal corporation, and the relator would have no legal right to complain." So too in *Macfarland* v. *Bieber,*[103] where the Act of Congress requires the commissioners of the District of Columbia "to deduct $1.00 each month from the pay of each fireman" for the creation of a relief fund from which a pension shall be paid firemen, the court held that "a fireman discharged from service therefor (disabled in line of duty) does not acquire a vested property right to his pension which cannot be divested by a subsequent Act of Congress." In *State* v. *Trustees,*[104] the statute read: "*There shall be paid into such fund by each and every member* during their term of service the following sums monthly," specifying them. The Supreme Court of Wisconsin says: "While the law of 1899 and similar laws, in form, require the officers to pay a certain sum per month out of their salaries into the pension fund, they in fact are not required to do so. The contribution to the fund *is made by the public out of public money.* It is not first segregated from the public funds so as to become private property and then turned over to the control of the pension board, but is set aside from one public fund and turned over to another regardless of the mere words of the law. The effect thereof is to scale down the salaries of the officers in form by so much as measures the contribution by each to the pension fund, but to really fix such salaries at the amount actually paid and to require the payment by the city into the pension fund of the amounts, per month, mentioned as being taken from salaries. Such amounts are no less public money after such payment than before." To the same effect are the cases in the Supreme Court of California.[105]

California, Colorado, District of Columbia, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Utah, Virginia, Washington, and Wisconsin, all have pension funds for policemen, firemen, teachers, or employees, derived in part from contributions retained or deducted from salaries to be paid and have considered them valid. Ohio is the only state that has held differently, and that will be considered below.

(b) Another view is that these contributions are part of the fund provided by the contract of employment between the teacher and the

[103] Macfarland v. Bieber (1909), 32 App. D. C. 513; Rudolph v. United States (1911), 36 App. D. C. 379.

[104] State v. Trustees (1904), 121 Wis. 44, 49; State v. Knowles (Wis. 1911), 130 N. W. 451.

[105] Pennie v. Reis (1889), 80 Cal. 266; Clarke v. Police Ins. Board (1898), 123 Cal. 24; Burke v. Board of Trustees (1906), 87 Cal. App. 421; Cohen v. Henderson, 124 Pac. 1037; Compare Kavanagh v. Board of Police (1901), 134 Cal. 50.

public authorities.[106] As has already been stated a public school teacher is a public employee; he has authority to teach in any particular school only by virtue of a contract made with those in control of such school. His relation to such is based upon the contract made. No one has any right to teach in the public schools except upon the terms prescribed by the state, and by those in whom the control of the public schools has been vested. The state certainly can name terms and conditions by statute, which will enter into and become part of any contracts to teach made afterward, just as fully as if they were expressly written into any formal contract signed by the parties thereto, just as the statute of frauds applies to every contract made. This seems too plain to need citation of authority. There are, however, excellent authorities directly in point.

In *Ball* v. *Board of Trustees*,[106a], the Act of 1896, provided that any teacher who had taught in the public schools for 20 years, and had become incapacitated, shall at his request be retired, and shall thereafter receive an annuity fixed by the law out of the fund made up partly by contributions from teachers and partly by gifts, etc. In 1899, the Act of 1896 was so amended that the retirement of a teacher should be dependent upon the approval of the board of trustees, and not merely upon request as before. *Held*,—the legal relation between public school teachers who accepted the Act of 1896, and the trustees of the fund was that of contract, the terms of which were the provisions of the act,—and this could not be altered without consent of both parties, upon sufficient consideration, and the Act of 1899 could not change the terms of the contract. So too, the later case of *Allen* v. *Board of Education*,[107] holds the same way. Here the plaintiff brought an action to recover $54.16 salary for April, 1910, and from which the Board of Education deducted $1.08, being 2%, claiming the right to do so under teachers' pension law of 1907. Plaintiff had entered into a written contract in May, 1909, and began her duties in September, 1909. The Teachers' Retirement Fund was created by statute in 1896, amended in 1899. In *Ball* v. *Trustees, supra,* it was held that under these acts the relation between the teachers and the Trustees of the Fund, was one of contract, and no teacher was a member of the fund unless he had elected to become so. The Act of 1907, provided that "Every person

[106] Atkin v. Kansas (1903), 64 Kans. 174, 97 Am. St. R. 343, — U. S. —, 24 S. Ct. 124.

[106a] Ball v. Board of Trustees (1904), 71 N. J. L. 64; see also Steinson v. Board of Ed. (1901), 165 N. Y. 431, 59 N. E. 300; Murphy v. Board of Ed. (1903), 84 N. Y. S. 380; Moore v. Board of Ed. (1907), 106 N. Y. S. 983; see Atty. Gen'l v. Board (1908), 154 Mich. 584.

[107] Allen v. Board of Education (N. J. 1911), 79 Atl. 101.

who shall be appointed to any position . . . on or after January 1, 1908, shall become a member of the fund by notice of that appointment."

"This statute was in force when the contract between the plaintiff and defendant was entered into, and it formed a part of such contract and was one of the terms of employment of the plaintiff. The creation of this fund was an important public measure, which may well be considered as tending to make the system of free schools established by the act both thorough and effective by rendering the position of the teacher a more desirable one, because of the advantages arising out of the fund. It was a public scheme designed for the betterment of a branch of the service. It was offered to persons seeking and desirous of becoming teachers, who were at liberty, at their option, to accept such positions, subject to the terms of the statute, or to refuse them. If they did accept, then the provisions of the act became by such acceptance binding upon them. We conclude therefore that the act aside from any constitutional invalidity, became a part of the contract entered into between the parties to this suit, and authorized the deductions of the percentage retained by the school board, and that the judgment of non suit was properly ordered.

"It is said to deprive persons of property without due process of law, by taking the property of one person and giving it to another, or if the use be considered a public use, then a taking without compensation. This argument loses sight of the fact that by the terms of the agreement of employment embodying the statutory terms, the salary to be paid was a net amount, and not a gross amount, and thus there was in fact no taking.

"Next objection is that it cannot be sustained as the exercise of the taxing power of the State. In answer it may be said the act is not intended to be, and is not in fact an exercise of that power.

"Another objection is that *it is special,* contrary to Const. Art. 4, sec. 7, par. 11, legislature shall not pass *private, local* or *special laws.* Argument is: Grant is to the Teachers' Ret. Fund—*a corporation or association,* exclusive privileges, and to those employed prior to January, 1908, the right to receive their entire salary, without deduction; which right is denied to those employed afterwards. The statute necessarily considered two classes—those employed before and those after its approval. It could not change the contracts of those employed before, and it was not possible to compel all teachers to be governed by the act,—*Ball* v. *Bd. of Trustees,*—but it gave these the option to come in. Its benefits therefore were not exclusively for those hiring afterward. Where all the objects that can consti-

tutionally be included in a class are included such legislation is general." . . . "Contracts relating to the employment of teachers under a thorough and efficient system of instruction, if they could be divorced from the system, certainly are not improperly related to it. From these contracts becomes established a fund available for disabilities and infirmities of old age, and therefrom flow inducements for long and continued service, with its consequent enlarged experience, and other numerous advantages readily recognized by every thoughtful person making for efficiency and thoroughness. The title of the act expresses a single object, and the creation thereby of the Board of Trustees of the Teachers' Ret. Fund is germane to and one of the products of the act."

An English case holds:[108] Where a school board, without statutory authority, established a pension fund, by a deduction of 2% from salaries of such teachers as consented, and to which a teacher consented and allowed the deduction for nine years, such teacher could not recover the money so paid although the board had no authority to create such a fund, if it actually did so, for there was no failure of consideration.

The following case[109] is inconsistent with the case just referred to, but only on the *ultra vires* character of the action of the school board. It is in general accord otherwise with the foregoing cases. The facts were:

The Board of Education of Minneapolis, without express legislative authority adopted rules to form a pension fund for teachers, by *requiring* teachers when they were employed to enter into a contract consenting that one per cent of their salaries should be deducted, and applied to such fund. *Held,* not authorized by the legislature. LEWIS, J.: "The conviction cannot be avoided that the effect of such a requirement, when applied to all teachers employed, must be to compel some of them, at least, to enter into the contract upon compulsion, and without any expectation of receiving any personal benefit therefrom. It is difficult, therefore, to sustain the validity of the act on the part of the *board of education* in thus withholding the 1 per cent of the salaries on the ground that such a plan was voluntarily entered into by the teachers in signing the contract." . . . "Here the board of education are not acting voluntarily, as individual members, but they have acted and are acting as a board claiming to be clothed with authority under the law to exact from the teachers employed a certain percentage of their compensation. It may

[108] Phillips v. London School Board (1898), 2 Q. B. 447.
[109] State v. Rogers (1901), 87 Minn. 130, 91 N. W. 430, 58 L. R. A. 663.

be admitted that the purpose to be accomplished in providing an annuity for those who have been faithful, and who have become incapacitated in the service, is a worthy one and, in a general sense, for the benefit of the schools. We do not wish to intimate that the care of those who have given their life work to a cause of such benefit to the public may not to some extent be provided for when the limit of activity is reached, *and the fund for that purpose be raised by taxation.* It certainly conduces to the welfare of the school system to make it profitable and attractive for persons to devote themselves to the work, and, if it would attract to the service a better class of teachers, is not such an object for the benefit and welfare of the school system? *Conceding therefore that the legislature might grant the power within proper limits to provide a fund for such purpose, it is very clear that it has not been done.*

"The board's authority is also questioned on the ground the money retained is public money. . . . If the entire salary had been paid to the relator, and he had then voluntarily relinquished or paid back 1 per cent thereof for the purposes expressed, it would clearly be private money; but 1 per cent never had been paid in fact, and it never was contemplated that it should be. When the relator entered into the contract he surrendered absolute control over that portion of his salary, and in effect, entered into a contract with the board that his salary should be 99 per cent of the amount nominally stated. So from this view it appears that the money never left the treasury, but remained public money, and the Board had no authority to divest it from the uses mentioned in the statute."

(c), and (d) Opposed to the foregoing doctrines that the moneys retained are public moneys, and the contributions are contracted to be paid by the teacher in order to obtain a pension from the State when he retires are some Ohio cases. The leading one takes the view that the amounts retained are either *taxes* imposed upon the teachers, and invalid because not uniform, or they are a taking of the private property of the teachers without compensation or without due process of law. In the light of the foregoing cases it seems impossible to hold these views, and the Ohio cases are unsupported by other authority.

The facts in the principal Ohio case were:[110]

Ward had been employed as a night teacher in the schools of Toledo at $24 per month, and had accepted such appointment after the pension law (92 O. L. 683) in "City districts of the 3rd grade

[110] Hubbard v. State (1901), 22 O. C. C. 252, 12 O. C. D. 87, 65 O. S. 574, 64 N. E. 109, 58 L. R. A. 654. See also State v. Kurtz (1901), 11 O. C. C. D. 705, 21 R. 261; 11 O. D. 266, 8 N. P. 152.

of 1st class" (Toledo) had been enacted, and was notified in writing that his appointment was subject to the provisions of the act. At the end of the first month he applied for his salary of twenty-four dollars ($24) and was offered this sum less 1% or 24c, being the amount authorized "to be deducted" from his salary under the law to be paid into the pension fund. He brings mandamus to compel the issuing to him a warrant for the full amount of his salary. The court in ruling for the plaintiff says in reference to such deductions being taxes:

"Sec. 26, Art. 2, provides "all laws of a *general nature* shall have uniform operation throughout the state."

"The common schools are provided for in the constitution and constitute an institution in which every community and citizen is interested. The subject matter therefore is of a general nature, and whether a law is of a general nature is determined by the subject matter. Sec. 2 of the Act provides that the board of education of such city shall *at its first meeting* after the act goes into effect, &c., and the teachers shall within thirty days do certain things. This clearly makes it impossible to be applied to future cities which may come within the third grade of first class, and therefore it cannot have an uniform operation throughout the state."

"Const. Sec. 2, Art. 12, "Laws shall be passed taxing by uniform rule all moneys, credits, &c." Now if pension legislation is for the benefit of the public,—for the public good,—then money raised for such purposes can only be regarded as taxes, and this money deducted from the teacher's salary is a tax. It is taking a certain percentage of the money or property they are entitled to, from month to month, for the public good, and if this pension legislation can be sustained, and if a tax to raise pensions can be levied, in our judgment that tax should be levied upon all of the property and citizens owning property in the school district where the pension law is in force. A law which imposes the burden of taxation upon one class of citizens, to-wit, teachers, cannot be called a law taxing by a uniform rule."

This reasoning certainly is incorrect if the sums retained are already public money,—since they are raised by taxation of property under general laws for school purposes, and not by *taxing* the teachers at all,—and the sums retained never became the property of the teachers, if in fact retained. And again if they were in fact paid to the teachers first and became part of their property, and were afterward paid back by the teachers into such a fund under an agreement to do so, they would not be *taxes* at all, but would be either voluntary *gifts* to the State,—and there is no law forbidding

such,—or payments made by the teachers to the State in consideration of its promise to pay such teacher a *pension* (contingent though it might be upon uncertain events) when he shall have served a certain length of time. This would be a *quid pro quo,* even though the State might repeal the pension law entirely before the right to the person vested by fulfilling all the other conditions.

The court continues as to the contributions being a *taking* of the teachers' property as follows:

"If on the other hand, the money so deducted is not to be regarded as taken for the public good, and as taxation, then it is the taking of the private property from one citizen for the benefit of another, without his consent and against his will," contrary to Sec. 19, Bill of Rights that "Private property shall ever be held inviolate." "It is argued in favor of this act that the 1% so taken and devoted to this purpose is not taken from the teachers or from their salaries, but is taken, and should be held to be taken, from the public funds; that the effect and result of the act is simply that the teachers are paid that much less in salaries; but this argument is contrary to the express language of the statute, which provides § 1, "One per cent of salaries paid to all teachers . . . shall be deducted, &c.," so that the statute by its own terms and express language provides that this money shall be deducted from their salaries; and that is in fact what was done in this city, and sought to be done in this case. Contracts were made with the teachers to pay them a certain salary, and from that salary as agreed to be paid one per cent was deducted and devoted to this purpose. A teacher's salary is his property. He has a right, under the constitution to use that salary for his own benefit or for the benefit of others as he sees fit. If he thinks it best to provide for old age, he may do so; but if he prefers to spend his money as he earns it, it is his right under the constitution, to do that."

It will be noted that the statute in this case reads the same as those involved in *Pennie* v. *Reis,* and the cases in New York, District of Columbia, Wisconsin, and California above reviewed, and is in direct conflict with them upon this point.[110a] No one of these cases was referred to in any of the Ohio cases. In the *Kurtz*[110b] case, in the Circuit Court, the court did not refer to this point, but held a similar law unconstitutional because it was a general law, and could

[110a] Pennie v. Reis (1889), 80 Cal. 266, 132 U. S. 46; Matter of Friel (1905), 101 App. D. 155; Matter of Mahon v. Board of Ed. (1902), 171 N. Y. 265, 89 Am. St. R. 810; Macfarland v. Bieber (1909), 32 App. D. C. 513; Rudolph v. U. S. (1911), 36 App. D. C. 379; State v. Trustees (1904), 121 Wis. 44, 49.

[110b] State v. Kurtz (1901), 11 O. C. D. 705.

not, under the constitution, be limited to the City of Cleveland, just as the court in this case holds the law is unconstitutional also because, being general, it is limited to Toledo,—this reason being abundantly supported by the Ohio decisions upon such legislation in regard to other matters. The law held unconstitutional in this case was amended in 1902, (95 O. L. 609) so as to read "All teachers hereafter appointed . . . shall be notified within 30 days after their appointment, and they shall be required to notify said board of education within six months thereafter whether they consent or decline to accept the provisions of this act." The circuit court of Ohio has said in a later case,[110c] that this amendment has removed both of the defects—non-uniform taxation of teachers, and taking their property without their consent,—in the *Hubbard* case. If the contributions were really *taxes,* it is difficult to see how *consent* of teachers would make them any more uniform; and if they are not *taxes* but matters of contract they do not have to be uniform;[110d] so too if they merely are part of the terms and conditions the State imposes upon all teachers who engage in teaching after the law goes into effect, for the general benefit of the school system, and the amounts contributed are based upon a reasonable classification, according to term of service, they would be valid under the principle of graded taxation of inheritances,[111]—for the right to teach school in public schools is no more of a private right than is the right to inherit or devise property. And even if such contributions are compulsory upon teachers entering the service after the law goes into operation, or upon such consenting old teachers as continue in the service, they are still valid under the decisions of the Supreme Court of the United States, on the principle on which are based the compulsory contributions in the bank guaranty cases,[112] and of the state courts, the compulsory contributions in the workmen's industrial insurance cases.[113]

The *Hubbard* case also further says: "Liberty to acquire property by contract can be restrained by the general assembly only so far as

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[110c] Venable v. Schafer (1906), 28 O. C. 202, on 205. The firemen's and police pension laws (Gen'l Code, Ohio 1910, §§ 4600 et seq.) require only such contributions from a member "as he voluntarily agrees to."

[110d] See note 74 above, State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C. 542.

[111] Knowlton v. Moore (1900), 178 U. S. 41; State v. Frear (1912), 148 Wis. 456, Ann Cas. 1913 A, 1147; Keeney v. New York (U. S. 1912), 32 S. Ct. 105; Union Trust Co. v. Wayne Prob. J. (1901), 125 Mich. 487.

[112] Noble State Bank v. Haskell, 219 U. S. 104, 31 S. C. 299.

[113] Borgnis v. Falk Co. (1911), 147 Wis. 327, 133 N. W. 209; Cunningham v. N. W. Imp. Co. (Mont. 1911), 119 Pac. 554.

such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive. . . . The right to labor and enjoy the reward thereof is a natural right which may not be unreasonably interfered with by legislation. . . . Our Bill of Rights prohibits the granting of privileges to one which are denied to others of the same class, and the impositions of restrictions or burdens upon certain citizens from which others of the same class are exempt. . . . All laws of a general nature shall have a uniform operation throughout the State..... A statute therefore which imposes restrictions or burdens, or grants special privileges to persons engaged in the same business, under the same circumstances, cannot be sustained... In our judgment each individual has the right to draw his full salary, and spend it or save it as he sees fit, and that is his right as a citizen under the constitution."

This is not entirely clear; the court seems to hold that the right to acquire property by contract, includes the right to contract with the State to teach school, not on the terms fixed by the State, but on some terms inherent in the teacher beyond the control of the State. Such a doctrine cannot be sustained either upon reason or authority. It takes two to make a bargain, and the State has as much right to fix the terms upon which it will employ some one as any other employer has, and to name the terms is only to make an offer, and in no way deprives any one of his liberty to contract,[114] and especially to hold office or employment in the public service.[115] No case has been found following the *Hubbard* case in this regard. The substantial basis on which this Hubbard case can rest is that it was special legislation applying to only one City of the State contrary to the Constitution. The other objections to the law are untenable.

The Constitution provides the salary of no public officer shall be decreased after election or appointment.[116] This provision does not apply to any officer holding at the will of the appointing or employing

[114] Atkin v. Kansas (1903), 64 Kans. 174, 97 Am. St. R. 343, — U. S. —, 24 S. Ct. 124; In re Broad (1904), 36 Wash. 449, 70 L. R. A. 1011, 78 Pac. 1004; Byars v. State (Okla. 1909), 102 Pac. 804; Soliah v. Heskin (1912), — U. S. —, 32 S. Ct. 103. Compare People v. Coler (1901), 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. R. 605; Street v. Varney Co. (1903), 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. R. 325; Withey v. Bloem (Mich. 1910), 128 N. W. 913.

[115] Atty. Gen'l v. Jochim (1894), 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. R. 606; Moore v. Strickling, 46 W. Va. 515, 50 L. R. A. 279; State v. Grant, 14 Wyo. 41, 116 Am. St. R. 982.

[116] Const. Mich. 1909, Art. XVI, § 3.

power, such as teachers or firemen.[117] As to such teachers (if teachers were public officers), or officers who commence to teach or accept office after such law goes into effect, it does not operate as a breach of contract or decrease compensation, if what is retained is public money, since the salary offered is actually only the net amount, and the agreement is to take the lower compensation. The same is true of those who have existing contracts, or who are in office at the time the act goes into effect, since the provisions do not apply to them unless they accept within a year. If they do accept, then there is no *decrease of salary,* but either donations by the one affected, or the purchase of a future contingent annuity from the State by him.

"Section IX. Boards of education, trustees and other school authorities, having duties to perform in respect to the payment of salaries to public school teachers who are under this act, shall cause to be deducted from each warrant or order issued to any of such teachers for the payment of such teachers, the amount due from such teacher to the teachers' retirement fund and forward the same to the treasurer of this fund in the manner prescribed by the retirement fund board.

Penalty for Neglect of Duty. Any teacher, member of a board of education, member of the Retirement Fund Board, or any other person who shall neglect to perform his duty as prescribed by this act, after due notice has been given defining such duty, shall be liable to a penalty of fifty dollars for each offense, to be recovered in an action of debt in the name of the people of the State of Michigan. And in case of any such liability, the attorney general, upon requisition of the retirement fund board, shall prosecute and recover the penalty herein provided, and when recovered pay the same into the state treasury to the credit of the primary school fund."

The provisions of this section need no comment further than what has been said concerning the provisions of Section VIII. They are within the power of the State in providing the necessary administrative machinery for enforcing the law.

"Section X. *Retirement of Teachers.* A teacher who has taught for a period of thirty years, at least fifteen years of which period, including the last five years immediately before the date of application for retirement, shall have been taught in the public schools in this state, shall, upon his retirement from actual service as a teacher, on or after August 1, 1913, be entitled to an annuity of a sum equal to one-half of the average annual contractual salary paid to said teacher during the last five years of service, provided that no annuity shall exceed the sum of five hundred dollars annually, nor less than two hundred and forty dollars annually.

2. A teacher who has taught for a period of twenty-five years, at least fifteen years of which period, including the last five years immediately before the date of application for retirement, shall have been taught in the public schools of this state, shall, upon his retirement from actual service as a teacher, on or after August 1, 1913, be entitled to an annuity which bears the same ratio to the annuity provided for on retirement after thirty years of service

[117] Ward v. Board of Ed., 11 O. C. D. 671; Somers v. State, 5 So. D. 321; State v. Johnson, 123 Mo. 43.

as the total number of years of service of said person bears to thirty years.

3. A teacher who has taught in the public schools of this state for a period of fifteen years, and who is either physically or mentally incapable of teaching and who is deemed deserving of an annuity by the Retirement Fund Board, may be retired and shall, upon his retirement be entitled to an annuity of as many thirtieths of the full annuity for thirty years as said teacher has taught years in the public schools of this state.

4. Such retirement may be had on request of the teacher, or upon the request of a board of education of a school district. A request for retirement shall be made in writing addressed to State Teachers' Retirement Fund Board, accompanied by evidence showing that the teacher named is entitled to retirement, and that he has complied with the provisions of this act and the rules of the board relating to the payment of annuities. The board shall pass upon all requests for retirement and shall determine whether such requests should be granted.

5. In computing the terms of service under this act, a year shall be a legal school year at the time and place where said service was rendered except that where the service was rendered in schools not included within the provisions of this act, a time less than a legal school year in this state shall not be included as a year, but only as such proportion of a year as the number of teaching weeks in each such year bears to the number of weeks required to constitute a legal school year in this state."

These provisions are so similar to those under consideration in the numerous cases reviewed herein, that but little more need be said. The objections made are: that such payments are not for a public but a private purpose; that they are mere gratuities; that they are granting of extra compensation. The first of these has been fully considered, and we found that if they were to be paid only to such teachers as were in the service at the time the act went into effect or entered it afterward, the payments were then for the public purpose of improving the service; but if they were to be made to those who had retired from the service before the act took effect, then by some decisions they would be mere *gratuities,* or extra compensation. According to the provisions of this section it was to apply to a teacher "upon his retirement from actual service as a teacher, *on or after* August 1st, 1913." The bill, if it had been enacted, would have gone into effect before that time. By § I a teacher is a "person employed"; by § VIII, "any person employed as a teacher when this act takes effect," has one year to elect to come under it; and by § XI, no one is eligible who "has not contributed" to the fund. Our schools open in the fall after August 1, each year. These provisions, with the general rules that laws are to have a prospective rather than retrospective operation, and be given such construction as will make them constitutional rather than unconstitutional, if that can be done without violence to the language,—make the proposed law applicable, in my judgment, only to those teachers who have been engaged in the actual work of teaching after the proposed act took effect. We have already seen that, by

all the cases except *State* v. *Ziegenhein*,[118] if this is true, then these payments are not mere gratuities for private purpose.

According to this interpretation however, it would apply to one who had served, say to make an extreme case, only through the month of September, all of his 30, 15, and 5 years of service except this one month being before it. Would the allowance of a pension to such a teacher, if he made up his 60 per cent contribution required by § XI, be *"extra compensation,"* "after the service had been rendered or the contract entered into," contrary to the constitution?[119] I do not think so. Our Supreme Court has ruled that "the superintendent of schools is not a contractor, and an increase of his salary —$4,000 to $6,000—after an appointment for a particular term,— 3 years from June, 1906, the increase to take effect in June, 1907,— looks to the future and not to the past, and hence does not violate" the similar provision in our old constitution.[120] It was held in *Pennie* v. *Reis*,[121] and in *State* v. *Love*,[122] that such payments are not *extra compensation* contrary to such constitutional provisions. The same view is implied in the New York and Pennsylvania cases already reviewed.[123] Even the Missouri case intimates that if any thing had been withheld from the salary, the pension to be granted would then not have been extra compensation,[124] and this provision has not generally been invoked in police and firemen cases, although it exists in most states.[125] In reason too, such a payment, in the case of a *new* teacher, would be a part of the compensation under the contract, and as to an old one it would be the offer of a new contract for a consideration paid by or to be paid by him to the State if the deduction were made from his salary, and agreed to by him. Such a provision was not designed to prevent the establishing of a pension system for poorly paid public servants, who contribute to the fund necessary, and could at most only apply to the grant of mere gratuities for private purposes.

That these payments to teachers do not have to be the same for

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[118] State v. Ziegenhein (1898), 144 Mo. 283, 66 Am. St. R. 420, supra Note 75.

[119] Const. 1909, Art. XVI, § 3; Art. IV, § 21, of the old constitution.

[120] Attorney Gen'l v. Bd. of Ed. (1908), 154 Mich. 584; see also, Hudson v. Atty. Gen'l (1907), 150 Mich. 67; Olds v. Commrs. (1903), 134 Mich. 442.

[121] Pennie v. Reis (1889), 80 Cal. 266.

[122] State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C. 542.

[123] Matter of Mahon v. Board, 171 N. Y. 263, 89 Am. St. R. 810; People v. Partridge (1902), 172 N. Y. 305; Commn. v. Walton (1897), 182 Pa. 373; Commn. v. Baker (1905), 211 Pa. St. 610, 61 Atl. 253.

[124] State v. Ziegenhein (1898), 144 Mo. 283, 291, 66 Am. St. R. 420, 423.

[125] O'Connor v. Trustees (1910), 247 Ill. 54, 93 N. E. 124; Hubbard v. State (1901), 22 O. C. C. 252, 12 O. C. D. 87.

the same term of service,[126] or may be graded according to time of service and amounts of contributions is ruled by cases already reviewed and the workmen's compensation cases cited.[127]

"Section XI. *Payment of Annuities.*

1. A teacher shall not be entitled to an annuity who has not contributed to the retirement fund an amount equal to at least 60 per centum of his annuity for one year. But a teacher who is otherwise entitled to retirement and an annuity under this act, may become an annuitant and entitled to an annuity by making a cash payment to the retirement fund of an amount which when added to his previous contributions to said fund, will equal 60 per centum of his annuity for one year.

2. In case a teacher who shall retire or be retired, is unable to pay in advance the sum required to make up the said 60 per centum of the yearly annuity, the payment of such annuity may be withheld until the portion of the annuity withheld shall equal the sum required to make up said 60 per centum of the annuity.

3. Annuities shall be paid quarterly to the teachers entitled thereto, upon the warrants or orders signed by the president and secretary of the State Teachers' Retirement Board. Vouchers or receipts shall be signed in duplicate by annuitants upon receiving the money paid to them. Said duplicate receipts shall be returned to the secretary of the board, and one of them shall be retained in his office and the other shall be filed in the office of the State Treasurer.

4. Each annuity shall date from the time when the State Teachers' Retirement Board shall take action upon the request made as hereinbefore provided for the retirement of the annuitant."

There seems to be nothing invalid in the foregoing provisions. They have been covered in what has already been said. That teachers who have taught only a short time after the act goes into effect, are entitled to pensions as well as others is directly ruled by *O'Connor* v. *Trustees,* and *State* v. *Knowles,*—only two out of twenty years having been served after law went into effect.[128]

"Section XII. *Refunds.* Any teacher who shall cease to teach in the public schools of this state before receiving any benefit or annuity from the retirement salary fund, shall, if application be made in writing to the Retirement Fund Board within four months after the date of his or her resignation, or removal, be entitled to the return of one-half of the amount, without interest, which shall have been paid into the fund by such teacher. If such teacher should again thereafter teach in said public schools, he or she shall, within one year from the date of his or her return to the service in said public schools, refund to the retirement salary fund the amount so returned to such teacher, together with simple interest on said amount (but not to exceed six per centum per annum) for the time such amount was withdrawn from the fund."

"Section XIII. Any person retiring under this act may again enter upon the work of teaching in said public schools; during said term of teaching the

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[126] State v. Love (1911), 89 Neb. 149, Supra Note 74.

[127] Borgnis v. Falk Co. (1911), 147 Wis. 327; Cunningham v. Imp. Co. (Mont. 1911), 119 Pac. 554.

[128] O'Connor v. Board of Trustees (1910), 247 Ill. 54, 155 Ill. App. 460; State v. Knowles (1911), 145 Wis. 523, 130 N. W. 451. See Notes 71, 72, 73, and 74 above.

annuity paid to such person shall cease. Said annuity shall again be paid to said person upon his or her further retirement."

"Section XIV. A suitable office in the capitol with suitable furniture and office supplies shall be furnished the retirement fund board."

"Section XV. Nothing in this act shall be construed in such a way as to interfere with any existing fund for the payment of retirement salaries to public school teachers."

These provisions for refund seem to be entirely valid for two reasons: (1) it becomes a part of the agreement when one enters into the service after the law goes into effect; and (2) the amount deducted remains in the treasury as public funds,—and hence does not deprive any teacher of his property without due process of law, even if no part is to be repaid to him. This is covered by the cases already fully reviewed.[129]

From this study of pension legislation, and decisions, it is believed the proposed law under the rules above given, is valid in every particular, and the Ohio and Missouri cases stand alone and are in conflict with the great current of legislation and decision in all the other states and of the Federal government.

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[129] See Notes 101-109 above.